



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2008-05) *ESTATE OF HUME*

To: State Bar Office of Governmental Affairs

From: John Hartog, Chair, Executive Committee,
May Lee Tong, Member, Executive Committee, and Chair, Incapacity Committee
Trusts and Estates Section, State Bar of California

Re: Amendment of Probate Code §§2400 and 1063, and creation of Probate Code §2401.1
Re: Legislative Response to *Conservatorship of Hume* (2006) 139 Cal.App.4th 393

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DIGEST:

Prior to the decision of *Conservatorship of Hume* (2006) 139 Cal.App.4th, it was generally understood by probate practitioners that real property of a conservatee or ward was not included in the conservatorship and guardianship estate for purposes of preparing and filing inventories and accountings.

However, given the holding of *Hume*, there is now a requirement that conservators and guardians must take affirmative steps to inventory and account for real property owned by the conservatee or ward, regardless of the value of said property and the expense that would be associated with the effort to inventory and account for such property.

The proposed legislation would amend Probate Code §§2400 and 1063, and create a new §2401.1, so that specific statutory provisions exist requiring conservators and guardians to act with ordinary care and diligence with respect to property of the conservatee or ward regardless of where it is, but clarifying that there is no duty to inventory such property or account for such property. These new provisions would also require conservators and guardians to report to the

court as to the existence of said property and what, if anything has or will be done with the property.

HISTORY AND PURPOSE:

On May 10, 2006, the Fourth District Court of Appeal decided the case of *Conservatorship of Hume* (2006) 139 Cal.App.4th 393 and addressed whether real property held by a conservatee or ward in a foreign jurisdiction was part of the “estate” for purposes of preparing and filing an inventory and accounting. In *Hume* the public guardian, as conservator, filed a first and final accounting and report. The accounting referenced income being received by the conservatorship estate from income property in Tennessee. The accounting, however, did not report on the status of the Tennessee property or include it in the conservatorship accounting as an asset of the conservatorship estate. Moreover, the inventory, filed by the conservator, did not list or value the Tennessee property.

The conservatee’s son objected to the accounting and argued, among other things, that the conservator had a duty to include the Tennessee property in the accounting. The trial court ruled that the conservator had no duty to include property in foreign jurisdictions in the accounting. The Court of Appeal reversed and held that a conservator has the duty to account for all the conservatee’s property, including property in foreign jurisdictions.

The Trusts and Estates Section has recognized certain positive aspects of the *Hume* decision. Specifically, as the Court recognized, under current law a personal representative of an estate may rely on a conservatorship final accounting regarding the assets of the conservatee in determining what assets are part of the decedent’s estate. In essence, the personal representative in an estate proceeding has no independent duty to investigate or verify that the matters reported in the conservatorship accounting, including the identification of the assets reflected in the accounting. Given the ability of a personal representative of an estate to rely on a conservatorship accounting regarding the property owned by the conservatee, *Hume* now requires the conservator to report the existence of all property of the conservatee, even if the property is in a foreign jurisdiction.

Additionally, the Court in *Hume* recognized that a conservator or guardian, as a fiduciary for an incompetent person or minor, is the person “standing in the shoes” of the conservatee or ward, and if the fiduciary is not going to consider or act upon property in a foreign jurisdiction, who will? *Hume* requires the fiduciary to address the existence of property in foreign jurisdictions; such a requirement is perceived to be good public policy.

However, the Trust and Estates Section has identified significant concerns regarding the application of *Hume* requirements to inventory and account for property in a foreign jurisdiction in each and every case. As applied against the current provisions of the Probate Code, the decision of *Hume* requires, in each and every case, that all property be inventoried and appraised, including real property in a foreign jurisdiction. The concern, from a practical aspect, is that many states may not have procedures in place that would easily allow a California probate referee to value real property in foreign jurisdictions. As such, there is significant uncertainty regarding exactly how to value real property in foreign jurisdictions in light of the California probate referee scheme. Also unclear is the time and expense that will be involved in such an

appraisal effort. In addition, *Hume* creates a rigid rule that the fiduciary must take possession and control of real property in foreign jurisdictions as part of the duty to marshal and account for all property. While it certainly may be appropriate and necessary for a conservator to do what is needed to take control of real property in a foreign jurisdiction in a given case (e.g., take steps to establish an ancillary proceeding), there may be many situations where the time and expense of taking control of a worthless parcel of real estate in a foreign jurisdiction outweighs the utility of such action.

As a result of these practical concerns of the application of *Hume* on each and every case, the Trust and Estates Section believes that it would be more appropriate to enact legislation requiring that the fiduciary use ordinary care and diligence with respect to such property, report the existence of such property to the court, and articulate what action, if any, has or will be taken as to such property. The specifics of this proposal are as follows:

- Including a statutory definition of “estate” by amending section 2400 to add a new subparagraph (c), which would define the word “estate” to mean real property located in California.
- Adding a new statute, section 2401.1, to address the duties and responsibilities of the fiduciary regarding such property. Section 2401.1 would provide that the fiduciary shall use ordinary care and diligence with respect to any property located in a foreign jurisdiction, the same standard for care and management already found in existing section 2401. Section 2401.1 also provides guidance on when one must account for income and/or other receipt of funds related to property which is located in a foreign jurisdiction, and refers the reader to section 1063, the current statute which requires certain additional schedules depending on certain factual situations.
- Amending section 1063 to require the fiduciary to attach a separate schedule to the accounting which identifies the property, provides a good faith estimate of the fair market value of the property, and states what action, if any, will or has been taken with respect to the property.

SIMILAR LEGISLATION:

No similar legislation has been introduced to date.

PENDING LITIGATION:

None known.

FISCAL IMPACT:

No anticipated fiscal impact.

LIKELY SUPPORT/OPPOSITION:

There is no known opposition.

GERMANENESS:

The State Bar's Trusts and Estates Section deals with administration of conservatorships and guardianships, and the Section members are involved with conservatorships and guardianships on a regular basis. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

TEXT OF PROPOSAL

SECTION 1. Section 1063 of the Probate Code is amended to read:

1063. (a) In all accounts, there shall be an additional schedule showing the estimated market value of the assets on hand as of the end of the accounting period, and a schedule of the estimated market value of the assets on hand as of the beginning of the accounting period for all accounts subsequent to the initial account. The requirement of an estimated value of real estate, a closely held business, or other assets without a ready market, may be satisfied by a good faith estimate by the fiduciary.

(b) If there were purchases or other changes in the form of assets occurring during the period of the account, there shall be a schedule showing these transactions. However, no reporting is required for transfers between cash or accounts in a financial institution or money market mutual funds as defined in subdivision (d) of Section 8901.

(c) If an estate of a decedent or a trust will be distributed to an income beneficiary, there shall be a schedule showing an allocation of receipts and disbursements between principal and income.

(d) If there is specifically devised property, there shall be an additional schedule accounting for income, disbursements, and proceeds of sale pursuant to Section 12002 and subdivision (a) of Section 16340.

(e) If any interest has been paid or is to be paid under Section 12003, 12004, or 12005, or subdivision (b) of Section 16340, there shall be a schedule showing the calculation of the interest.

(f) If the accounting contemplates a proposed distribution, there shall be a schedule setting forth the proposed distribution, including the allocation of income required under Section 12006. If the distribution requires an allocation between trusts, the allocation shall be set forth on the schedule, unless the allocation is to be made by a trustee after receipt of the assets. If the distribution requires valuation of assets as of the date of distribution, the schedule shall set forth the fair market value of those assets.

(g) If, at the end of the accounting period, there are liabilities of the estate or trust, except current or future periodic payments, including rent, salaries, utilities, or other recurring expenses, there shall be a schedule showing all of the following:

- (1) All liabilities which are a lien on estate or trust assets.
- (2) Taxes due but unpaid as shown on filed returns or assessments received subsequent to filing of returns.
- (3) All notes payable.
- (4) Any judgments for which the estate or trust is liable.
- (5) Any other material liability.

(h) If the guardian or conservator has actual knowledge of any property of the conservatee or ward located in a foreign jurisdiction, the guardian or conservator shall include an additional schedule which identifies the property, provides a good faith estimate of the fair market value of the property, and states what action, if any, will or has been taken with respect to preserving and protecting the property.

SEC. 2. Section 2400 of the Probate Code is amended to read:

2400. As used in this chapter:

(a) "Conservator" means the conservator of the estate, or the limited conservator of the estate to the extent that the powers and duties of the limited conservator are specifically and expressly provided by the order appointing the limited conservator.

(b) "Guardian" means the guardian of the estate.

(c) "Estate" means all of the conservatee's or ward's personal property, wherever located, and real property located in this state.

SEC. 3. Section 2401.1 is added to the Probate Code, to read:

2401.1. The guardian or conservator shall use ordinary care and diligence with respect to any property located in a foreign jurisdiction, of which the guardian or conservator has actual knowledge. What constitutes use of ordinary care and diligence is determined by all the circumstances regarding the property and the particular estate. The guardian or conservator, except as provided in Section 1061(a) and Section 1062, is not charged with and shall have no duty to inventory, take possession of, or account for such property. However, the guardian or conservator shall, when accounting to the court, include the schedule set forth in Section 1063(h).